

# **Watershed Council**

**Southwest Florida Watershed Council, Inc.**

**P.O. Box 61063, Fort Myers, FL 33906-1063**

**www.swfwc.org**

August 26, 2002

Ms. Sherry Scott, P.G.  
Water Policy Coordinator  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33406

Re: Draft White Paper on "Reservation of Water for the Environment and Assurances  
for Existing Legal Sources Consistent with Federal and State Law"

Dear Ms. Scott:

The Southwest Florida Watershed Council appreciates this opportunity to comment on the Draft White Paper on Reservations of Water for the Environment and Assurances of Existing Legal Sources Consistent With Federal and State Law. The Watershed Council is a grass roots, multi-county coalition of individuals, organizations, agencies and businesses that have come together to address issues affecting the Caloosahatchee and Big Cypress watersheds. We have a strong interest in reservations of water for the environment, both as part of the Comprehensive Everglades Restoration Program (CERP) process and as an independent state process for protecting the valuable estuarine and coastal watershed resources of our region.

We believe that the reservation of water for the environment is a key issue in Everglades restoration. Because of increasing demands and current water shortfalls, we are deeply concerned that by the time CERP projects are in operation, there may not be enough water available to reserve for the environment. Some watersheds, such as the Caloosahatchee, may be over-permitted now, and there is concern that natural systems have not been protected in the consumptive use permitting process. We believe that there is a need to reserve water for the environment today -- before the design and construction of CERP water projects.

While the Water Resources Development Act of 2000 (WRDA) and the federal-state agreement require existing consumptive uses to be protected, focusing too fervently on existing consumptive uses today could lead to little water for the environment tomorrow. CERP projects should be designed to deliver water for the environment, first and foremost, and then be expanded or modified as necessary to satisfy consumptive uses.

We have been encouraged by language in the White Paper and by discussions with staff from the South Florida Water Management District (SFWMD) that the SFWMD is considering "pre-

*The mission of the Southwest Florida Watershed Council is to protect, conserve, manage and/or restore the land and water resources of the Caloosahatchee and Big Cypress Watersheds through participation and cooperation of all stakeholders in consensus building, planning, and decision making to meet the*

CERP” reservations for protecting fish and wildlife in estuaries in the region. For the Caloosahatchee and its estuary, especially, we strongly urge you to expedite this process to ensure that the allocation of “baseline” water solely for existing users does not destroy the resource before additional water is made available from CERP projects in the basin. Any baseline for the Caloosahatchee should include enough water to make protection of natural systems a reality today.

It is not just the natural system that will suffer if the resources provided by the Caloosahatchee and other coastal estuaries are destroyed. The economy of the region will also suffer. It has been estimated that the Caloosahatchee estuary alone contributes \$147 million to the regional economy.

Specific comments follow that are referenced to the page number and line number of the White Paper:

*Page 6, lines 28-42:*

We would like the White Paper to clarify whether the language of the WRDA “savings clause” in Section 601(h)(5) means that the water necessary for fish and wildlife in the Caloosahatchee, for instance, will be considered an “existing legal source of water.” How and when will the amount of this water be determined? If this is considered as part of the baseline, how is this water protected now? This water has not been reserved, nor has it necessarily been adequately protected through the Consumptive Use Permitting (CUP) process to date. Protection of this water should not have to await the construction of CERP projects.

*Page 7, lines 11-20:*

We would like the White Paper to explain how the District intends to implement Section 373.1501(5)(a). Will this analysis and evaluation proceed now or after the operation of CERP projects for additional water?

*Page 7, lines 22-28:*

Section 373.1501(5)(d) protects “existing legal users,” but this term has not been defined in either the statute or the District’s rules. Can “existing legal users” include water necessary for fish and wildlife, as it does under WRDA?

*Page 8, lines 13-14:*

We believe that certain “existing legal uses” in the Caloosahatchee basin are contrary to the public interest, as evidenced by extensive low flow impacts and Minimum Flows and Levels (MFL) rule exceedences. These conditions have resulted from an operation schedule for Lake Okeechobee that emphasizes storage for uses other than the estuarine environment.

*Page 10, lines 36-38:*

CUP criteria do not prevent harm to Caloosahatchee water resources up to and including the one in ten year drought frequency. These problems need to be resolved before the pre-CERP reservation can be effectively determined.

*Page 12, lines 30-34:*

While this principle includes the quality of the water for the baseline, and WRDA speaks in terms of quantity and quality of water for the environment, there is no discussion in the White Paper about how the quality of the water that is reserved for protection of fish and wildlife will be ensured. This has been an issue in the Okeechobee/Caloosahatchee system, with polluted back-pumped agricultural runoff used to provide freshwater flows for the estuary.

*Page 13, lines 1-9:*

This principle needs to be clarified, particularly for a pre-CERP baseline for water necessary for fish and wildlife. If the Caloosahatchee River, for instance, had ample freshwater flow in 1995, but not in December 2000, what would the baseline be for water for fish and wildlife?

*Page 13, lines 19-40:*

If projects and operations in place as of December 2000 are considered part of baseline, will MFLs also be considered part of baseline?

*Page 13, line 42-46:*

It is unclear how local rainfall, surface storage, and runoff can be regional sources of available water. If these local sources were allocated to the region, then they would no longer be available locally.

*Page 14, lines 4-5:*

While sources may vary with precipitation and hydrology, we do not believe that they should be assigned priority based on manipulation of the sources for human needs. This could mean that the environment is always assigned the least reliable sources.

*Page 14, lines 7-16:*

We disagree with the principle as stated. We strongly support a principle, as discussed in the issue statement, that demands should be based upon permits in use.

*Page 14, lines 26-29:*

We support the inclusion of MFLs as demands.

*Page 14, lines 30-37:*

We support the inclusion of demands for water deliveries for wetland protection, aquifer recharge, other resource protection, and fish and wildlife. It is unclear whether the use of the term "regional environmental areas" is intended to restrict fish and wildlife "demands" to certain specific areas or whether the term is used generally. Does this mean that water necessary for fish and wildlife in other areas cannot be considered a demand?

*Page 14, lines 39-42:*

Historic operational deliveries under federal regulation schedules have caused extensive impacts from low flows to the Caloosahatchee Estuary and, as such, should not represent fish and wildlife demands.

*Page 15, lines 9-17:*

It is unclear how the definition ties in with the definition of "demands" on page 14. Instead of demands, the term "of which there was a dependence" is used. Is this synonymous with "demands"?

We support the inclusion of resource protection and protection of fish and wildlife as existing legal sources. The problem, however, is that these sources are not necessarily being adequately protected now. We want to make sure that these sources are protected prior to the CERP reservations, so that they do not have to compete with Everglades restoration.

Existing legal sources, as defined, may not be consistent with the "presently existing legal uses of water," particularly if the SFWMD interprets this second term as including permits not in use, as opposed to permits in actual use.

*Page 15, lines 19-28:*

Would the operational conditions that existed in December 2000 determine the amount of water reserved for fish and wildlife in the Caloosahatchee, for instance, even if the operational conditions as of that date resulted in reduced freshwater flows that were much less than those that prevailed under previous operational conditions?

*Page 16, Table and Figure 3:*

We are concerned that the Caloosahatchee has been classified as an agricultural legal source user basin. Was this based on hydrology, water use, or economic activity? The water naturally flows to the estuary, serving fish and wildlife. Most of the economic activity is urban.

We request that both the Caloosahatchee estuary and Estero Bay be classified as legal source user basins for environmental purposes.

*Page 17, lines 4-16:*

The pre-CERP baseline is going to estimate the amount of water available to the environment. Yet, the proposal is to exclude "regulatory discharges," because these have not been historically depended on by the natural system. The term, "regulatory discharges," is not defined in the document, but the term has been used to refer to discharges from Lake Okeechobee based upon the U.S. Army Corps of Engineers schedule for regulating lake levels. Regulatory discharges from Lake Okeechobee, including discretionary releases under the WSE schedule, are often the only sources of water to maintain the Caloosahatchee Estuary during dry season conditions. Regulatory discharges are an important component of flow maintenance for compliance with the MFL Recovery and Prevention Plan to the Caloosahatchee Estuary during the dry season and as such should be included in the volume probability curve. We also believe that there is no basis for assuming that higher wet season flows have not been historically depended on by the natural system. Wet season flows of freshwater in the Caloosahatchee would have been historically higher than dry season discharges prior to the installation of control structures and implementation of regulatory releases, leading to fish and wildlife dependence on these fluctuations. Does this proposal mean that only the dry season flow can be considered as necessary for fish and wildlife?

*Pages 18-24:*

While WRDA and state law provide that the water reserved for natural systems from CERP projects should meet water quality standards, the discussion of how CERP reservations will function only deals with quantity and not quality. We are concerned that nutrients and other pollutants delivered to estuaries through restored flows in the Everglades may create more damage to those ecosystems.

*Page 21, lines 9-39:*

This section on pre-CERP water reservations for the environment focuses on water for the Everglades Protection Area. We believe strongly that other pre-CERP reservations should be made for estuaries and coastal watersheds throughout the region.

*Page 26, Figure 1:*

The line in the figure for "Existing Environmental Performance (2000)" should not be the baseline for the environment. This line should include a pre-CERP reservation for the environment that is sufficient to protect fish and wildlife.

*Page 28, Figure 3:*

The figure should also show the western part of the Caloosahatchee basin.

Page 42, lines 29-31:

We again suggest that permits in use be viewed as a demand condition assumption.

Page 42, line 40:

Tidal discharges that are necessary to protect fish and wildlife should be included in demands.

Page 43, lines 1-3:

Again (note page 14 comment), historic operational deliveries have been damaging to fish and wildlife in the Caloosahatchee Estuary and should not be considered appropriate demands for fish and wildlife.

Page 49, lines 42-45:

How are the boundaries of these "environmental areas" defined? Do they include upstream areas and flow ways?

As a last, generalized comment, we would like to encourage you to move away from the idea of using *either* actual use *or* amounts permitted for baseline numbers, and instead use permitted amounts -- *where progress toward the permitted use has been demonstrated*. This will provide for entities issued permits who are *actively* planning for additional use.

On behalf of the Watershed Council, I request that you incorporate these comments in a redraft of the strategy in the White Paper. Please inform me of the District's response to these comments and let me know what the next steps will be in the process.

Sincerely,

A handwritten signature in cursive script that reads "Noel Andress". The signature is written in black ink and is positioned below the word "Sincerely,".

Noel Andress  
Chairman